Summary: Defendants filed a motion for summary judgment asserting that the discretionary function exception to liability under the Federal Tort Claims Act barred Plaintiff's tort claims. The Court granted the motion finding that the actions of the Defendants were discretionary in nature and that the conduct was of the kind that the discretionary function exception was designed to protect.

Case Name: Hinsley v. Standing Rock Child Protective Services, et al.
Case Number: 1-05-cv-118
Docket Number: 30
Date Filed: 1/22/07
Nature of Suit: 360

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Jessica Hinsley, personally and as Guardian ad litem for K.M., a minor, Plaintiff, vs. Standing Rock Child Protective Services and the Bureau of Indian Affairs, Defendants.	)	**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Case No. 1:05-cv-118

Before the Court is the defendants' Motion for Summary Judgment filed on November 28, 2006. The plaintiff filed a response in opposition on December 28, 2006. For the reasons outlined below, the Court grants the motion.

I. BACKGROUND

The Standing Rock Sioux Tribe operates a Child Protective Services ("CPS") agency under a contract awarded by the Bureau of Indian Affairs. Child Protective Services investigates incidents

of child neglect, child abuse, and sexual abuse of children and has the authority to take custody of abused children and place those children with other families.

The plaintiff, Jessica Hinsley ("Hinsley") contends that she was injured as a result of negligent acts or omissions on the part of the Standing Rock Sioux Tribe's Child Protective Services program. Hinsley alleges that CPS placed her brother (T.C.) in Hinsley's home without notifying her that T.C. was a child molester and, as a result, T.C. molested Hinsley's daughter, K.M.

T.C. is Jessica Hinsley's younger brother. He was in the custody of Child Protective Services until his eighteenth birthday. Shortly before T.C.'s eighteenth birthday, his case worker in South Dakota, Mabel Medicine Crow ("Medicine Crow"), called James McLaughlin, ("McLaughlin") an investigator for the Standing Rock Sioux Tribe Child Protective Services. Medicine Crow asked McLaughlin to do a courtesy check with Hinsley to see if T.C. could stay with her upon his release from Child Protective Services. See Deposition of James McLaughlin, pp. 7-8. Medicine Crow informed McLaughlin that while T.C. was a minor, he had abused young girls at one of the foster homes he had been placed at in South Dakota. Child Protective Services removed T.C. from that foster home and subsequently placed him in a group home in Huron, South Dakota.

McLaughlin contends that he drove out to Hinsley's residence sometime in August 2004 and asked Hinsley if she was willing to have her brother, (T.C.), come and live with her. McLaughlin contends that he specifically informed Hinsley that T.C. had sexually abused young children while placed in a foster home and that T.C. should not be left alone with little children because he might sexually abuse them. In his deposition, McLaughlin states that T.C. "shouldn't be trusted with little kids, don't leave him, don't let him baby-site your kids or he can't be trusted with little kids, that he might sexually abuse them." See Deposition of James McLaughlin, p. 13, l. 17-20. Hinsley

contends that McLaughlin never drove out to meet with her, but instead McLaughlin simply called her at her place of employment. Hinsley also contends that McLaughlin never informed her of T.C.'s dangerous propensities nor did McLaughlin ever warn her not to leave T.C. alone with her children.

On August 20, 2004, the Standing Rock Sioux Tribal Court issued an order relieving Child Protective Services of custody, control, and supervision of T.C. as of August 22, 2004 - T.C.'s eighteenth birthday. Hinsley contends that she had neither seen nor was she aware of the order releasing T.C. from Child Protective Services custody until after this lawsuit was commenced. See Deposition of Jessica Hinsley, p. 16; see also Docket No. 25. Hinsley contends that she believed T.C. was formally placed into her home. See Docket No. 25.

The Government argues that no representations were made to Hinsley that a formal placement of T.C. was being made into her home. See Docket No. 24-1. Although Hinsley asserts that she believed that T.C. was formally placed in her home by Child Protective Services, Hinsley acknowledges that she voluntarily accepted T.C., did not sign a placement agreement, and received no payments or followup visits or contact with Child Protective Services. See Deposition of Jessica Hinsley, p. 19. Finally, the only contact between Hinsley and Child Protective Services after T.C. moved in with her was when Hinsley contacted Child Protective Services to see if T.C. needed to see a doctor and to say she needed a social security card and other items so T.C. could go to school. Child Protective Services informed Hinsley that she was not entitled to T.C.'s medical background, and only gave T.C.'s birth certificate to Hinsley. See Deposition of Hinsley, pp.46-47.

The Government contends that it should be granted summary judgment for two reasons: (1) the discretionary function exception to liability under the Federal Tort Claims Act bars Hinsley's

claims; and (2) the Government did not have a duty to warn Hinsley about the propensities of T.C..

II. LEGAL DISCUSSION

A. STANDARD OF REVIEW

It is well-established that summary judgment is appropriate when, viewed in a light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Graning v. Sherburne County, 172 F.3d 611, 614 (8th Cir. 1999). A fact is "material" if it might affect the outcome of the case and a factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The basic inquiry for purposes of summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376 (8th Cir. 1996). The moving party has the initial burden of demonstrating to the Court that there are no genuine issues of material fact. If the moving party has met this burden, the non-moving party cannot simply rest on the mere denials or allegations in the pleadings. Instead, the non-moving party must set forth specific facts showing that there are genuine issues for trial. Fed. R. Civ. P. 56(e). A mere trace of evidence supporting the non-movant's position is insufficient. Instead, the facts must generate evidence from which a jury could reasonably find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

B. DISCRETIONARY FUNCTION EXCEPTION

It is well-established that Congress has waived the sovereign immunity of the United States by giving district courts jurisdiction over certain tort actions. 28 U.S.C. § 1346(b). However, Congress has excepted from this limited waiver "[a]ny claim... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If a case falls within this statutory exception to the Federal Tort Claims Act, the Court lacks subject matter jurisdiction. See Feyers v. United States, 749 F.2d 1222, 1225 (6th Cir. 1984) cert denied, 471 U.S. 1121, 1125 (1985).

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." Dykstra v. U.S Bureau of Prisons, 140 F.3d 791, 795 (8th Cir. 1998). Its purpose is to prevent "judicial second-guessing of legislative and administrative decisions grounded in social, economic, and policy through the medium of an action in tort." United States v. Gaubert, 499 U.S. 315, 323 (1991). When properly construed, it "protects only governmental actions and decisions based on considerations of public policy." Id; see Kane v. U.S.,15 F.3d 87, 89 (8th Cir. 1994) (day- to-day decisions, made in furtherance of the policy, may be protected under the exception). Therefore, its application is a jurisdictional issue which precedes any negligence analysis. Johnson v. U.S., Dept. of Interior, 949 F.2d 332, 335 (10th Cir. 1991). The applicability of the discretionary function exception is governed by the nature of the conduct at issue, rather than the status of the actor. Berkovitz v. U.S., 486 U.S. 531, 536 (1988).

The United States Supreme Court has articulated a two-part test to be applied in determining whether a particular claim falls under the discretionary function exception to the waiver of sovereign

immunity. See United States v. Gaubert, 499 U.S. 315 (1991); Berkovitz by Berkovitz v. United States, 486 U.S. 531 (1988). The first part of the test requires a determination of whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. If so, the discretionary function exception does not apply because there was no element of judgment or choice in the conduct at issue. United States v. Gaubert, 499 U.S. 315, 322. The Supreme Court has recognized that the requirement of judgment or choice is not satisfied if there is a statute, rule, regulation, or administrative policy that specifically prescribes a course of action for an employee to follow.

However, if the challenged conduct is determined to be discretionary, the second part of the Gaubert test is to determine whether the conduct is "of the kind that the discretionary function exception was designed to shield." Gaubert, 499 U.S. 315, 322-323. As previously noted, when Congress enacted the Federal Tort Claims Act, its desire was to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy. In other words, where there is room for policy judgment and decision, there is discretion of the sort protected by the Federal Tort Claims Act.

1) WHETHER THE ACTION IS A MATTER OF JUDGMENT OR CHOICE FOR THE ACTING EMPLOYEE

The Court's initial inquiry concerning whether the action is a matter of judgment or choice for the acting Government employee is mandated by the language of the discretionary function exception. Berkowitz v. U.S., 486 U.S. 531, 536 (1988). "[C]onduct cannot be discretionary unless it involves an element of judgment or choice." Id. Thus, when a federal statute, rule, regulation, or

policy specifically prescribes a course of action for an employee to follow, the exception will not apply. Id. Conversely, when no federal mandate is found, the employee's conduct is considered to be the product of judgment or choice and the Court's initial inquiry is satisfied.

For the purposes of a summary judgment motion, the facts are viewed in a light most favorable to the plaintiff. Accordingly, for the purpose of this motion, the Court assumes that McLaughlin did not warn Hinsley regarding T.C.'s dangerous propensities of sexual abuse towards children.

The plaintiff contends that there are state and federal statutes that Child Protective Services must follow when placing a child and that these statutes provide the framework by which CPS should have acted. The plaintiff cites to two statutes to support her contention, Section 14-09-06.1 of the North Dakota Century Code and The Indian Welfare Act, 25 U.S.C. § 1915(b). However, these statutes express the policy that the best interests of the child be considered in the placement of a child by the court or agency and do not mandate the procedures for warning the public or third parties upon the discharge of an individual from Child Protective Services. See N.D.C.C. § 14-09-06.1 (providing that "[a]n order for custody of an unmarried minor child ... must award the custody of a child to a person, agency, ...as will, in the opinion of the judge, promote the best interests and welfare of the child.") (emphasis added); 25 U.S.C. § 1915(b) (providing that [a]ny child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family....") (emphasis added). Further, the statutes cited to by the plaintiff requires the agency in question to consider the best interests of the child, and do not regulate or control the considerations of the affect placement of the child will have on the third party into whose home the minor child is placed.

To establish that the actions complained of did not involve an element of judgment or choice, the burden is on the plaintiff to link their claims with any facts, statutes, regulations, or policy guidelines that would call into doubt the discretionary nature of the government actor. Johnson v. United States, 47 F. Supp. 2d 1075, 1080 (S.D. Ind. 1999). The plaintiff has cited no statutes, rules, regulations, or policies on point, which would provide any guidance or in any way limit the discretion of Child Protective Services under the facts and circumstances presented here. The Court is unaware of any statutes, rules, regulations, or policies which mandate a warning to others about the dangerous propensities of a child upon the discharge of that child from the custody of a protective agency.

In the absence of a mandatory regulation, the Court finds that the actions of Child Protective Services employees must be considered a product of judgment or choice. In other words, the Court finds that Child Protective Services employees acted within their discretion as to the discharge of T.C. and whether to warn third parties of his dangerous propensities. As a result, the first step of the discretionary function analysis is satisfied.

2) WHETHER THE CONDUCT IS OF THE KIND THAT THE DISCRETIONARY FUNCTION EXCEPTION WAS DESIGNED TO SHIELD

As previously noted, because the Child Protective Service agency's challenged conduct clearly involved an element of judgment or choice, the Court must next ascertain whether that judgment "is of the kind that the discretionary function exception was designed to shield." Berkovitz v. U.S., 486 U.S. 531, 536. The only types of judgments that the discretionary function exception were designed to shield are "governmental actions and decisions based on considerations of public

policy." Gaubert, 499 U.S. 315, 323 (1991); see Rosebush v. U.S., 119 F.3d 438, 444 (8th Cir. 1997) (explaining that the requirement for a policy nexus is an objective not a subjective one). The Court must determine whether the adjudication of Hinsley's claim would require it to second-guess a governmental policy decision.

At one end of the spectrum are those agency decisions outside the sphere of policy analysis where the discretionary function exception provides no defense to liability. For example, the exception would not apply in instances where a government official causes an accident due to his negligent driving. Gaubert v. U.S., 499 U.S. 315 n.7 (1991). "Although driving requires the constant exercise of discretion, the official's decision in exercising that discretion can hardly be said to be grounded in regulatory policy." Id. at 325. In other words, the discretion exercised by a government official who was driving in a negligent manner is not the type of judgment that the discretionary exception function is intended to protect.

At the other end of the spectrum are those agency decisions where the exercise of judgment or choice is directly related to the furtherance of the agency's policy goals. Examples of such an exercise of judgment include: the decision of Veterans Administration medical personnel not to warn a father of a former patient of the patient's dangerous propensities, Moye v. United States, 735 F. Supp. 179 (E.D.N.C. 1990); the decision not to warn medical personnel at an air force base of the release from military service of a mentally disturbed serviceman who subsequently shot 27 people at the base, Sigman v. United States, 217 F.3d 785 (9th Cir. 2000); and the decision by the Government, allegedly made with knowledge of an attacker's violent nature, not to commit or prosecute the attacker for a previous instance of assault and battery, Abernathy v. United States, 773 F.2d 184 (8th Cir. 1985).

Hinsley fails to address the second step of the discretionary function exception analysis. Hinsley has proffered no facts challenging the policy-based nature of the decision to warn. The defendants assert that decisions concerning the balance of the public safety with maintenance of a juvenile's privileged record are decisions protected from tort liability by the discretionary function exception. The Court agrees.

Although neither party has cited to any specific statutes, rules or regulations regarding any of the policies of Child Protective Services, the record reflects that Child Protective Services has a policy of not disclosing the personal information of a juvenile formerly under its custody. See Docket No. 21-2, p. 14. The Court concludes, as a matter of law, that the decisions of Child Protective Services employees which relate to the discharge of T.C. are directly related to policy analysis and public policy considerations. Such decisions implicate competing concerns of public safety and third party safety, the privileged record of a juvenile, and the juvenile's future interests upon release. The United States Supreme Court has made it clear that the focus of the inquiry is whether the challenged actions are "susceptible to policy analysis" and not whether they were, in fact, the result of a policy analysis. Gaubert, 499 U.S. 315, 324-325. See Hughes v. United States, 110 F.3d 765 (11th Cir. 1997).

Based on the above reasoning, the Court concludes, as a matter of law, that the Child Protective Service's challenged conduct is the type of conduct that the discretionary function was designed to protect. To conclude otherwise would be to engage in the type of "judicial second-guessing" that the discretionary function exemption was designed to avoid. Thus, the Court finds that the second part of the discretionary function exception analysis has also been satisfied.

III. CONCLUSION

The Court finds that this case clearly falls within this statutory exception to the Federal Tort Claims Act and that the Court lacks subject matter jurisdiction. The Court finds that it is unnecessary to address the Government's remaining grounds for summary judgment. The Court **GRANTS** the Defendants' Motion for Summary Judgment (Docket No. 19) and Hinsley's complaint is **DISMISSED** for lack of subject matter jurisdiction. The Clerk of Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated this 19th day of January, 2007.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court